

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

NATIONWIDE VAN LINES, INC.,

Respondent.

**Docket No. FMCSA-2007-26826¹
(Western Service Center)**

FINAL ORDER

1. *Background*

On October 17, 2006, the California Division Administrator of the Federal Motor Carrier Safety Administration (FMCSA) issued a Notice of Claim (NOC) to Respondent Nationwide Van Lines, Inc., proposing a civil penalty of \$29,400, based on the following violations of the Federal Motor Carrier Safety and Commercial Regulations: (1) one violation of 49 CFR 375.209(a), failing to have a complaint and inquiry handling program, with a proposed civil penalty of \$1,100; (2) one violation of 49 CFR 375.211(a), failing to participate in an arbitration program, with a proposed civil penalty of \$1,100; (3) one violation of 49 CFR 375.213(a), failing to furnish shippers with required documents prior to executing an order for service, with a proposed civil penalty of \$1,100; (4) one violation of 49 CFR 375.519(a), failing to provide a weight ticket in the form and manner prescribed, with a proposed civil penalty of \$1,100; and (5) one violation of 49 CFR 392.9(a), failing to register as a household goods motor carrier, with a proposed civil penalty of \$25,000.

¹ The prior case number was CA-2006-0562-US0662.

Respondent timely replied to the NOC and requested binding arbitration.

However, Respondent contested four of the five violations alleged in the NOC, admitting only that it did not have an arbitration program at the time of the August 22, 2006, compliance review that resulted in the NOC. On May 4, 2007, the Field Administrator for FMCSA's Western Service Center (Claimant) filed an Objection to Respondent's Request For Binding Arbitration and a Motion for Final Order (Objection and Motion), which argued that arbitration was not proper under the circumstances and that a final order should be entered because the evidence submitted with the Objection and Motion established a prima facie case that the violations occurred. Claimant advised that Respondent filed a Chapter 7 bankruptcy petition on March 2, 2007.² Respondent did not reply to Claimant's Objection and Motion.

2. Decision

A. Request for Binding Arbitration

Under 49 CFR 386.14(b)(3), a respondent may request arbitration only if it admits liability for the violations alleged in the NOC. The Agency's arbitration program is limited to resolving disputes over the amount of the proposed penalty or the terms of payment. Claimant is correct that this matter is not eligible for arbitration because Respondent admitted liability for only one of the five violations alleged in the NOC. Therefore, Respondent's request for arbitration is denied. Considering Respondent's Chapter 7 bankruptcy filing and the lack of substance to the defenses offered by Respondent in its reply to the NOC, nothing would be gained by designating this matter

² The bankruptcy petition was submitted for the record as Attachment D to Claimant's Objection and Motion.

for formal or informal hearing. Consequently, this matter will be determined based on the written record.

B. Motion for Final Order

A motion for final order is analogous to a motion for summary judgment. Therefore, the moving party bears the burden of clearly establishing that there is no genuine issue of material fact, and it is entitled to a judgment as a matter of law.³ All inferences must be drawn in favor of the non-moving party, Respondent in this case. Notwithstanding Respondent's failure to show any material facts in dispute, Claimant must establish a *prima facie* case; in other words, he must present evidence clearly establishing all essential elements of his claim.⁴ If Claimant makes a *prima facie* case and Respondent fails to produce evidence rebutting the *prima facie* case, the motion for final order will be granted.⁵

1. The Violations

Section 375.209(a) requires household goods carriers to establish and maintain a procedure for responding to complaints and inquiries from individual shippers. In support of this alleged violation, Claimant submitted the Declaration of FMCSA Transportation Specialist (TS) Lawrence Hawthorne.⁶ TS Hawthorne attested that Vincent Rabiola, Respondent's Vice President and Operations Manager, admitted that

³ See *In re Forsyth Milk Hauling Co., Inc.*, Docket No. R3-90-037, 58 Fed. Reg. 16916, at 16983, March 31, 1993 (Order, December 5, 1991).

⁴ *Id.*

⁵ *Id.*

⁶ Attachment E to Claimant's Objection and Motion (hereinafter referred to as the Hawthorne Declaration).

Respondent did not have a complaint and inquiry handling program and could not produce a written description of its procedure for responding to customer complaints and inquiries. Claimant submitted a signed statement by Mr. Rabiola dated August 22, 2006, in which he stated the company had no written procedure for responding to consumer complaints and inquiries.⁷

Respondent's reply was submitted under the signature of Lee Fischer, who identified himself as Operations Manager in the signature block, but Long Distance Operations Manager elsewhere in the reply. Mr. Fischer denied that Respondent had no complaint and inquiry handling program and claimed that the only person in the office at the time of the compliance review would have no knowledge about how complaints and inquiries were handled. Although Mr. Fischer did not mention Mr. Rabiola by name, Mr. Rabiola was in the office when TS Hawthorne conducted his compliance review. Given the fact that Mr. Rabiola identified himself as Respondent's Operations Manager, both in signing for the compliance review report and in his August 22, 2006, statement, and is listed in FMCSA's Motor Carrier Management Information System as the company's owner, Mr. Fischer's implication that Mr. Rabiola was not sufficiently knowledgeable about the carrier's program for handling complaints and inquiries is not credible. Although Mr. Fischer purported to enclose documentation addressing the other alleged violations, he offered no evidence rebutting Mr. Rabiola's statement. Accordingly, Claimant established that Respondent violated 49 CFR 375.209(a).

Section 375.211(a) requires motor carriers of household goods to have an arbitration program for individual shippers. Respondent admitted that it did not have

⁷ Exhibit 7 to Hawthorne Declaration.

such a program at the time of the compliance review, although it had filed an application with the American Moving & Storage Association (AMSA) to participate in AMSA's arbitration program. Accordingly, Claimant established that Respondent violated 49 CFR 375.211(a).

At the time of the August 2006 compliance review, § 375.213(a) required that a household goods motor carrier, before executing an order for service, furnish prospective shippers with copies of five specific documents, including a summary of its arbitration program, a summary of its complaint and inquiry handling program and the FMCSA publication "Your Rights and Responsibilities When You Move."⁸ Mr. Rabiola, in his signed statement, admitted that such documents were not provided to shippers. Respondent's reply states that "Your Rights and Responsibilities When You Move" was given to the shipper at the time of pickup. However, distribution of the document at the time of pickup would still have violated § 375.213(a), which requires that the document be furnished before execution of the order for service. Since, as noted above, Respondent had neither an arbitration program nor a complaint and inquiry program, summaries of these programs could not have been distributed to prospective shippers. Accordingly, Claimant established that Respondent violated § 375.213(a).

Section 375.519(a) requires household goods carriers to obtain weight tickets containing specific information whenever the transportation charges are based on the weight of the shipment. According to the Hawthorne Declaration, Respondent failed to obtain proper weight tickets for a July 12, 2006, shipment of household goods transported

⁸ Section 375.213(a) has been subsequently recodified as 49 CFR 375.213(b). See 72 FR 36772, July 5, 2007.

from Fontana, California to Hayden, Idaho. The weight ticket in Respondent's file for this shipment did not contain two of the items required by § 375.519(a): the last name of the shipper and the shipment bill of lading number.⁹ Respondent's claim that a weight ticket was issued did not rebut the evidence that the weight ticket was not in the form and manner prescribed.¹⁰ Accordingly, Claimant established that Respondent violated 49 CFR 375.519(a).

At the time of the compliance review, § 392.9a(a) prohibited a motor vehicle providing transportation requiring registration with FMCSA from operating without the required registration or beyond the scope of any registration that has been granted.¹¹ According to the Hawthorne Declaration, Respondent transported the household goods of Ramon Color from West Minster, California to Las Vegas, Nevada. The shipment was picked up on May 31, 2006, even though the Agency's records show that Respondent did not receive its FMCSA registration until June 6, 2006. Respondent did not deny that the transportation cited in the NOC occurred and that FMCSA registration was required. However, Respondent claimed that an unnamed FMCSA employee from the Agency's

⁹ Exhibit 9 to Hawthorne Declaration.

¹⁰ Although Respondent stated it was enclosing a copy of the weight ticket, it failed to do so.

¹¹ Section 392.9a(a) was subsequently amended to change the term "registration" to "operating authority". See 71 FR 50867, August 28, 2006. Although the second page of the NOC incorrectly described the violation as "failing to register as a household goods motor carrier," the statement of charges included with the NOC made it clear that Respondent was being charged with engaging in prohibited transportation, not just failing to register. Consequently, the mischaracterization of § 392.9a(a) in the NOC was harmless error.

insurance section advised it on May 26, 2006, that its registration had been granted and it was authorized to operate in interstate commerce.

Respondent's allegations lack credibility. Exhibit 5 to the Hawthorne Declaration is a printout derived from the Agency's Licensing and Insurance database showing that Respondent's FMCSA registration was not granted until June 6, 2006. Moreover, the printout indicates that evidence of Respondent's liability insurance was not posted with the Agency until May 31, 2006. Therefore, Respondent had not met the Agency's registration requirements on May 26, 2006, and it was highly unlikely that an FMCSA employee would have advised Respondent it could operate in interstate commerce on that date. Even if Respondent had received such erroneous advice, Claimant correctly noted that FMCSA does not issue registrations by telephone.

2. The Civil Penalty

Respondent challenged the proposed \$29,400 civil penalty as excessive and likely to put it out of business. Indeed, Respondent filed for Chapter 7 bankruptcy protection shortly after filing its reply to the NOC. However, the proposed civil penalty for each violation was the minimum amount provided by law. As is stated in 49 CFR 392.9a(b), the civil penalty for violating § 392.9a is determined in accordance with 49 U.S.C. § 14901. Section 14901(d)(3) provides for a civil penalty of not less than \$25,000 for each violation if a person transports household goods in interstate commerce without the appropriate registration. The penalties for violating regulations in 49 CFR Part 375 are also established by statute. Under 49 U.S.C. § 14901(d)(1), a motor carrier of household goods that does not comply with any regulation relating to the protection of individual shippers is liable for a penalty of not less than \$1,000 per violation. In accordance with

the Debt Collection Improvement Act of 1996¹², which requires periodic adjustment of statutory penalties to account for inflation, the minimum penalty for such violations has been adjusted to \$1,100.¹³ In this case, the NOC proposed a civil penalty that was at the bottom of the penalty scale. Because the penalty was neither improper nor inappropriate, the penalty assessment is upheld.

3. The Bankruptcy Filing

Respondent's bankruptcy filing does not prevent imposition of a civil penalty in this proceeding. Under 11 U.S.C. 362(b)(4), the filing of a bankruptcy petition does not automatically stay "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." Such actions or proceedings include civil penalty proceedings.¹⁴ Although 11 U.S.C. 362(b)(5) stays the enforcement of a money judgment obtained in a governmental proceeding subject to the section 362(b)(4) exemption, it does not prevent FMCSA from determining whether a bankrupt carrier violated its regulations and assessing an appropriate civil penalty.¹⁵

¹² Public Law 104-134, 110 Stat. 1321-373.

¹³ See Appendix B to 49 CFR Part 386, paragraph (g)(7).

¹⁴ See *Securities and Exchange Commission v. First Financial Group of Texas*, 645 F.2d 429, 437 (5th Cir. 1981) (A continuing civil enforcement proceeding brought by a governmental unit and the enforcement of injunctive relief obtained therein are exempted from the automatic stay provisions); *In Re James H. Crockett*, 204 B.R. 705 (W.D. Tex. 1997) (Department of Labor civil penalty action for violating Federal labor laws not subject to automatic stay).

¹⁵ See *In the Matter of Jimmy Usry and Mary Simpson dba Simpson Trucking*, Docket No. FMCSA-2001-9279 (Order Denying Petition for Reconsideration, September 28, 2004).

The Agency has granted Motions for Final Orders against bankrupt carriers, even when it was unlikely that the civil penalty would be collected, because a carrier's history of prior adjudicated violations remains relevant in calculating civil penalties in future enforcement cases involving possible successor companies.¹⁶ In the *SBP* case, the Agency declined to impose a penalty because the carrier had already been dissolved. However, in the *Simpson Trucking* and *LSF* cases, the Agency imposed the proposed penalty because Respondent's operational status was unclear. Since there is no evidence of record in this proceeding regarding Respondent's current operational status, the proposed penalty will be imposed.

THEREFORE, *It is Hereby Ordered That* Respondent pay to the Field Administrator for the Western Service Center, within 30 days of the service date of this Final Order, a total civil penalty of \$29,400 for five violations of the Federal Motor Carrier Safety and Commercial Regulations. Payment may be made electronically through the Federal Motor Carrier Safety Administration's registration site at <http://safer.fmcsa.dot.gov> by selecting "Online Fine Payment" under the "FMCSA Services" category. This penalty is in addition and not in lieu of any additional outstanding penalties previously assessed. In the alternative, payment by cashier's check, certified check, or money order should be remitted to the Western Field Administrator at

¹⁶ See *In the Matter of SBP Trucking, Inc.*, Docket No. FMCSA-2001-10608 (Order Denying Petition for Reconsideration, March 15, 2005); *In the Matter of LSF Transportation*, Docket No. FMCSA-2001-11112 (Order, August 22, 2003; Final Order, January 3, 2005).

the address shown in the Certificate of Service.¹⁷



Rose A. McMurray

Assistant Administrator

Federal Motor Carrier Safety Administration

3-24-09

Date

¹⁷ Pursuant to 49 CFR 386.64, a petition for reconsideration may be submitted within 20 days of the issuance of this Final Order.

CERTIFICATE OF SERVICE

This is to certify that on this 25 day of March, 2009, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

Padideh Jafari, President
Nationwide Van Lines, Inc.
1582 Stagg Street
Van Nuys, CA 91406

One Copy
U.S. Mail

Charles Shamash, Esq.
8383 Wilshire Blvd., Suite 1010
Beverly Hills, CA 90211

One Copy
U.S. Mail

Nancy Jackson, Esq.
Trial Attorney
Office of Chief Counsel (MC-CCE)
Federal Motor Carrier Safety Administration
Golden Hill Office Center
12600 W. Colfax Ave., Suite B-300
Lakewood, CO 80215

One Copy
U.S. Mail

William R. Paden
Field Administrator
Federal Motor Carrier Safety Administration
12600 W. Colfax Ave., Suite B-300
Lakewood, CO 80215

One Copy
U.S. Mail

Terry D. Wolf
California Division Administrator
Federal Motor Carrier Safety Administration
1325 J Street, Suite 1540
Sacramento, CA 95814

One Copy
U.S. Mail

Docket Operations
U.S. Department of Transportation
1200 New Jersey Avenue SE
Room W12-140
Washington, DC 20590

Original
Personal Delivery


